BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JERRY KRUEGER, Claimant, v. KIT HOMEBUILDERS WEST, LLC, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	)	**IC 04-501791** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** FILED MAY 6 2005

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Boise, Idaho on October 5, 2004. Richard S. Owen represented Claimant. Max M. Sheils, Jr., represented Defendants. The parties submitted briefs and the case came under advisement on December 27, 2004. It is now ready for decision.

ISSUE

After due notice to the parties and by their agreement, the sole issue is whether Claimant's accident occurred within the course and scope of his work for Employer.

CONTENTIONS OF THE PARTIES

Claimant was involved in a motor vehicle accident.

Claimant contends he was performing a part of his duties at the time, namely, disposing

of parts for Employer. After doing so, he would have gone to Employer's premises, delivered an unused part from his prior project, and began preparing for his next project. The traveling employee doctrine establishes Defendants were liable for Claimant's injuries under the Idaho Workers' Compensation Law.

Defendants contend the coming and going rule precludes liability. Moreover, Claimant's status as an independent contractor precludes application of the traveling employee doctrine despite the fact that Surety contracted with Employer to cover Claimant knowing he was an independent contractor.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Oral testimony at hearing by Claimant and by Jerry "Skip" Ingle, who performed similar work for Employer, and Steven Stafford, Employer's service manager;

2. Claimant's exhibits 1 – 4; and

3. Defendants' exhibits A – C.

FINDINGS OF FACT

1. Claimant worked as a service technician for Employer. Although he was an independent contractor, Claimant was covered by Employer's policy for worker's compensation insurance issued by Surety. Claimant's relationship to Employer was as an independent contractor because he was one of five or six people who handled overflow work. Employer used its employee service technicians first. Claimant's arrangement with Employer was subject to Claimant's availability at Claimant's discretion and to Employer's need for an additional service technician. Employer specified more and stricter rules for its employees than for the independent contractors.

2. Claimant performed repair and warranty work mostly for Employer, mostly in Northern Nevada. Claimant would drive his motor home ("Winnebago") to Employer's premises, pick up whatever parts he would likely need, and drive to a customer's mobile home to effect repairs. Employer usually scheduled jobs for several customers to be performed on a single trip.

3. The business agreement between Claimant and Employer was entirely oral. They had worked this way for about 10 years.

4. Claimant was not paid for the time driving to Employer's premises or while on Employer's premises gathering and loading parts. He was paid an hourly rate and mileage from the time he left Employer's premises. The hourly rate differed depending upon whether he was driving or actually performing service work. When out overnight, Claimant was also paid a flat amount for sleeping in his Winnebago in lieu of paying for a motel. Claimant and other independent contractors were paid differently than regular employees. Claimant's pay was designed and agreed upon to compensate him for the use of his own vehicle and for other reasons.

5. The point at which mileage pay stopped was not rigidly specified by the parties; it could be Employer's premises in Caldwell or Claimant's home in Melba. Employer's premises were not available to Claimant 24 hours per day. Claimant's and Employer's business arrangement was based upon an "honor system." The reasonable mileage Claimant recorded was paid without question. For example, if Claimant discovered he needed additional parts while working a project, he was not expected to charge mileage necessary to obtain those parts, but Mr. Stafford, Employer's service manager, testified, "if he adds his mileage into that, I could care less."

6. Except for a very small number of items under warranty, Employer did not require a return of either unused parts or used parts from the customer's home. Employer did not specify any policy about parts disposal, except that Claimant was discouraged from leaving such waste at a customer's home. Employer did have dump bins on its premises. Claimant was allowed to salvage such parts for his own use or sale at his discretion or dispose of them at any reasonable location.

7. Claimant used a barn near Middleton to store used parts he wanted to salvage. Part of his route to Middleton coincides with his route from his home in Melba to Employer's premises in Caldwell; a small part of it – less than five miles of the roughly 40-mile distance between Claimant's home and Employer's premises – requires travel directly away from any reasonably direct route between his home and Employer's premises.

8. Claimant undertook a project for Employer. He loaded, drove, and serviced customers as usual. Once back in Idaho, he drove to Employer's premises in the vehicle he used for personal errands and delivered the paperwork necessary to get paid. As was his custom, he kept salvageable used parts and a new part that had been unused in his Winnebago until he was called for his next project. He still had some parts which needed disposal. About one week later – on June 18, 2003 – on his way to Employer's premises for his next project, Claimant intended to unload the salvageable parts at the Middleton barn. Claimant was traveling on the section of the route headed away from Employer's premises when he was involved in a motor vehicle accident. (The other motorist failed to yield.)

Discussion and Further Findings

9. These facts impact Idaho Code § 72-229, the "coming and going" rule, the "traveling employee" doctrine, and the "unreasonable departure" exception to the traveling

employee doctrine. Under Idaho Code § 72-229, Defendants are estopped from raising a defense that Claimant was an independent contractor where Surety issued a policy and collected a premium which covered Claimant under Employer's worker's compensation insurance policy. Claimant suggests that because Claimant was an independent contractor, Employer's lack of control over details of his work expands coverage to include any method by which Claimant performed his work. Defendants suggest the traveling employee doctrine does not apply because Claimant was not an employee. Neither argument is persuasive. Surety's decision to write a policy covering certain of Employer's independent contractors neither expands nor ameliorates its liability regarding those workers vis-à-vis Employer's other covered workers. For purposes of establishing whether the accident is compensable, Claimant should be considered on an equal footing with any other employee of Employer performing similar work. Otherwise, uncertain limits of expanded coverage would have a chilling effect on an employer's and surety's willingness to cover such independent contractors. Idaho Code § 72-229 plainly estopps Defendants from arguing coverage is more limited.

10. Idaho Code § 72-102(17)(a) specifies an injury must be caused by an accident "arising out of and in the course of" any employment covered by the worker's compensation law. Generally, workers traveling between home and work are not covered by application of the "coming and going" rule. *See generally*, Pitkin v. Western Const., 112 Idaho 506, 733 P.2d 727 (1987); Case of Barker, 105 Idaho 108, 666 P.2d 635 (1983), appeal after remand 110 Idaho 871, 719 P.2d 1131. However, with some exceptions, a traveling employee is covered portal to portal while on a business trip. *See*, Ridgeway v. Combined Ins. Cos. of America, 98 Idaho 410, 565 P.2d 1367 (1977). The traveling employee doctrine is an exception to the coming and going rule. *See*, Reinstein v. McGregor Land & Livestock Co., 126 Idaho 156, 879 P.2d 1089 (1994).

Thus, if Claimant is a traveling employee, the coming and going rule does not apply to relieve Defendants of liability for travel between Claimant's home and Employer's premises. Moreover, an interruption of a business trip is insufficient, by itself, to negate coverage. Cheung v. Wasatch Electric, 136 Idaho 895, 42 P.3d 688 (2002). Further, whether a claimant received pay for a particular aspect of a trip is a factor, not by itself determinative, in analyzing whether coverage applies. Case of Barker, *supra*.

11. By application of Idaho Code § 72-229, Claimant was a traveling employee. He made trips on Employer's behalf. It was the nature of his job.

12. A closer question is when any trip began and ended. Claimant's pay did not begin until he drove a loaded vehicle from Employer's premises. Nevertheless, it would be unreasonable to claim that he was not in the course and scope of employment while he loaded the vehicle. Thus, pay is not a useful factor in assessing when any trip began.

13. While it may or may not matter in this instance when a trip began, the more direct analysis seems to require consideration of when a trip ended. At least three potential points could be defined as the end of Claimant's trip. The first potential end point of the trip is Claimant's home. Claimant's mileage pay ended at Claimant's home or Employer's premises at Claimant's actual driving discretion. There is no evidence Employer would have balked if he had driven to any reasonable dump site before he reached his home or Employer's premises and charged that mileage. Claimant usually dumped the waste afterward, and did not charge mileage for doing so. The end point of mileage pay is a factor in determining where a trip ended. For this trip, mileage pay ended at Claimant's home.

14. Here, Claimant's delivery of paperwork is also a potential end point of the trip. Completion and delivery of the relevant paperwork was a necessary part of the job. Claimant

could have driven the Winnebago and dumped waste and returned the part to Employer's premises at the same time. Whether he might have combined his salvage storage with his paperwork delivery does not materially help the analysis because Claimant's stated reasons for not combining the trips were reasonable. Moreover, it was consistent with Claimant's custom during his years of work for Employer.

15. A third potential end point of the trip would be the dumping of the waste at whatever reasonable location Claimant chose. Although he was not paid directly for it, dumping the waste was a necessary part of the job. If this point were to be determined to be the end of the trip, under the analysis of Cheung, *supra.*, the interruption of six days or so at his home would not negate compensability for an otherwise compensable accident. Similarly, a deviation of a few miles on a trip involving several hundred does not by itself constitute an unreasonable deviation; *a fortiori*, it is not unreasonable where a traveling employee is disposing of waste by salvage in a manner in which the employer had acquiesced. Under this analysis, Claimant's salvage choices would be a part of the dumping of waste whether the remainder was dumped at the barn or at Employer's premises afterward.

16. A fourth potential end point of the trip would be the return of the unused part. However, this potentiality is quickly dismissed. Employer had written off the part – a tub surround – and did not expect it returned. It was unlike the warranty parts which Employer did expect to receive on return. The presence of the tub surround in Claimant's Winnebago at the time of the accident is not sufficient to form a basis for establishing liability. Otherwise, a traveling employee could keep an employer's property in his vehicle to extend coverage indefinitely. Note that the third and fourth end points might be geographically the same if Claimant were to have dumped the waste at Employer's premises at the same time he returned

the tub surround.

17. The general tenor of the traveling employee cases, including those cited above, suggests that traveling employees are covered, with certain specific exceptions, for all reasonable activities – whether within the course and scope of the job or not – from portal to portal during a trip. Having found that the dumping of waste was a necessary part of the job and that Claimant did so according to his usual custom of over 10 years, one need not analyze whether Claimant's acts constituted a deviation from his job as a traveling employee. Nevertheless, whether Claimant's salvage is characterized as a slight deviation for personal reasons or a part of the job of dumping waste integral to a trip is immaterial. It was not unreasonable in extent or purpose for Claimant to drive to the barn near Middleton.

18. What makes this a closer case is Claimant's decision to drive to Employer's premises twice – once to deliver papers and once to dump waste/pick up a load for the next trip. That decision exposed Employer to liability an additional time for the extra miles between Claimant's home and Employer's premises, about 40 miles one way. That extra driving may have been unnecessary, but was not unreasonable.

19. At all relevant times, Claimant's driving was reasonably related to the job functions he was hired to perform. Therefore, despite an interruption, Claimant had not ended his trip at the time of the accident. Claimant remained a traveling employee and his accident occurred within the course and scope of his employment.

CONCLUSION OF LAW

Claimant suffered an accident which occurred within the course and scope of his employment for purposes of Idaho Workers' Compensation Law.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 17TH day of March, 2005.

INDUSTRIAL COMMISSION

/S/_____
Douglas A. Donohue, Referee

ATTEST:

/S/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 6TH day of MAY, 2005, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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db /S/_____